Supreme Court, U.S.
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No. 03-349

IN THE

Supreme Court of the United States

JACK THWEATT, JR.,
on behalf of himself and all others similarly situated,

Petitioner,

v.

ELECTRONIC DATA SYSTEMS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether and, if so, under what circumstances, are disparate impact claims cognizable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34, despite legislative history which demonstrates that Congress was primarily concerned with *intentional* age discrimination?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Respondent, Electronic Data Systems Corporation, states that it has no parent corporation and that no publicly held company owns 10% or more of the Corporation's stock.

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Respondent Electronic Data Systems Corporation ("Respondent" or "EDS") respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari in this case.

INTRODUCTION

In *Adams v. Florida Power*, 255 F.3d 1322 (11th Cir. 2001), *cert. dismissed*, 535 U.S. 228 (2002), this Court initially granted the petition for a writ of certiorari to hear the question now at issue in this case. For the very reason the Court evidently dismissed the *Adams* petition, as well as for compelling reasons with respect to the nature of the circuit court split and the history of the ADEA itself, Respondent respectfully submits that the petition for a writ of certiorari presently before the Court should be denied.

First, and foremost, after oral argument in *Adams*, the Court dismissed the petition, apparently concluding that *Adams* was not an appropriate vehicle for considering the question whether and, if so, under what circumstances, disparate impact claims may be raised under the ADEA. Specifically, at oral argument, some members of the Court challenged the petitioner to identify the specific employment practice which caused the alleged disparate impact on older workers, rather than merely challenging the *bottom-line or cumulative effects* of the respondent's decision-making process to reduce its workforce.[1] To answer that inquiry in

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1. Justice Ginsburg, for example, stated

> But as — may I go back to the question we opened with, and that is I don't know of any case under Title VII where someone could just say reduction in force affected more women than men, therefore, I have an impact case. . . . [R]eduction of force in and of itself is not such a neutral rule . . . its too general. So where is the precise rule,

(Cont'd)

this case, Petitioner attempts to challenge Respondent's nationwide performance assessment and ranking process, the "Performance Management Process" or "PMP." Petitioner claims the PMP involved a multi-step process that included the application of subjective and objective criteria by thousands of individual decision-makers in their review of the individual performance of thousands of employees around the company, coupled with a multi-level ranking process that ranked each employee against all the employees that shared that individual's job code throughout the national EDS organization. (Pet. at App. 27-28; Complaint ¶¶35-36). Petitioner claims that this "Process" *as a whole* disparately impacted workers age 40 and older. (Pet. at App. 28; Complaint ¶36).

As evidenced by these very allegations, Petitioner actually has done nothing more than attack the alleged *cumulative or bottom-line effects* of this multi-component process in the same erroneous manner the petitioner in *Adams* sought to challenge the *cumulative or bottom-line* results of the respondent's decision-making process to reduce its workforce. (Pet. at App. 28; Complaint at ¶36). Contrary to this Court's established precedent, Petitioner has wholly failed to isolate and identify which of the numerous components of the PMP allegedly had a significantly disparate impact on employment opportunities for older workers. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 656-57 (1989). Petitioner's claim that Respondent's *entire* performance and ranking process system had an adverse impact is insufficient as a matter of law. *Id.* Because Petitioner

(Cont'd)

> practice, standard that's comparable to a high school diploma, a height and weight [requirement]. What is there in this case?

Adams v. Florida Power, 2002 WL 483467 *7 (oral argument transcript). App., *infra*, 5a.

has failed to meet this most fundamental requirement of pleading a disparate impact claim, the petition should be denied as this case is not appropriate to resolve when, and under what circumstances, disparate impact claims exist under the ADEA. Moreover, any debate about this critical point would be simply academic as this case arose in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), in which the Eleventh Circuit panel merely held in an unpublished opinion — without performing any analysis of the pleadings — that it was bound by its previous panel's holding in *Adams*. Accordingly, this case lacks a clear and cogent set of facts necessary to facilitate the Court's analysis of the question presented.

Second, while Respondent recognizes that the Court previously decided to hear the question presented in this case, Respondent respectfully submits that the Court should again consider that the purported judicial conflict is not as substantial as Petitioner suggests. Because no reasoned appellate court decision has recognized disparate impact claims under the ADEA since this Court's opinion in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), further consideration of the question by the lower courts would either resolve the conflict among them or sharpen it by provoking a reasoned basis for recognizing such claims.

Third, the decision below to follow *Adams* is correct and therefore does not require review by the Court. Again, with deference to the Court's previous decision to hear the issue in *Adams*, courts, commentators and Justices of this Court have recognized that the text of the statute, its purposes and history demonstrate that disparate impact claims should not be cognizable under the ADEA.

Accordingly, as it has now done at least five times in the recent past, *see, e.g., Adams, supra*; *United Airlines, Inc. v. Frank*, 532 U.S. 914 (2001); *Mullin v. Raytheon Co.*, 528

U.S. 811 (1999); *Ellis v. United Airlines, Inc.*, 517 U.S. 1245 (1996); *EEOC v. Francis W. Parker School*, 515 U.S. 1142 (1995), this Court should deny the petition and thus defer its consideration of the question presented.

STATEMENT OF THE CASE

Respondent, EDS, headquartered in Plano, Texas, is a leader in the global information services industry. EDS specializes in the application of ideas and technology to help private and public sector clients improve their businesses, products, services, and customer relationships. EDS is committed to equal employment opportunity in business operations and employment practices. EDS prohibits discrimination against any applicant or employee on the basis of age or any other protected characteristic.

Petitioner, Jack Thweatt, brought this disparate impact age discrimination claim under the ADEA on behalf of a putative class of EDS employees and former employees. Petitioner claims that he was selected for termination in January 2002 as part of EDS' alleged "rolling" reduction-in-force. (Pet. at App. 21-22, 30; Complaint ¶¶9-10, 13, 15, 43). He alleges that EDS' selection process for conducting its reduction-in-force was based "largely" upon individual employee rankings established through EDS' Performance Management Process ("PMP"), which was implemented in 2000 and revised in 2001. (Pet. at App. 25-27; Complaint ¶¶32-34). Petitioner describes the PMP process in 2000 as containing multiple components, including a performance review conducted by the employee's leader involving subjective and objective criteria; a team ranking of each individual conducted by each team leader; a group meeting of all supervisors to review the rankings of each individual team member and; finally, a ranking of all employees within a specific geographic region by a "Senior Director." (Pet. at App. 25-26; Complaint ¶33).

Petitioner alleges that in 2001, EDS revised the PMP process. While continuing to describe the PMP process as involving multiple components, Petitioner contends that the revised process afforded supervisors the power to subjectively determine the numerical values assigned to each job criterion based on that supervisor's individual impression of the importance of the criterion to the job. (Pet. at App. 25-26; Complaint ¶33). Then, each supervisor was empowered to subjectively score each employee based upon the value the supervisor had subjectively assigned to each criterion. (Pet. at App. 27-28, Complaint ¶35). Additionally, Petitioner asserts that in 2001, rather than ranking each employee within a geographic area, EDS assigned the ranking responsibilities to the "corporate ranks" who ranked each individual against all the employees that shared that individual's job code throughout the national EDS organization, fitting the local scores into ranking percentages that had been predetermined. (Pet. at App. 27-28; Complaint ¶35). Finally, Petitioner claims that "[o]rganizationally," there were "numerous delays" in the dissemination of information to supervisors, as well as "considerable confusion" in establishing performance objectives. (*Id.*) In summary, Petitioner claims that "[t]he Process" *as a whole* impacted workers age 40 and older within EDS adversely because they "tended to receive lower rankings in the PMP" and, consequently, were terminated in the reduction-in-force. Petitioner claims "that almost 70% of employees terminated in the reduction-in-force were age 40 and older." (Pet. at App. 28; Complaint ¶36).

Before the District Court, EDS moved to dismiss the Complaint for failure to state a claim upon which relief could be granted under Fed. R. Civ. P. 12(b)(6), arguing that the District Court was bound by the Eleventh Circuit's decision in *Adams*. The District Court agreed and granted EDS' Motion to Dismiss. On appeal, the Eleventh Circuit affirmed the District Court's order, concluding that it too was bound by the holding of the *Adams* panel.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR RESOLVING WHETHER AND, IF SO, UNDER WHAT CIRCUMSTANCES, DISPARATE IMPACT CLAIMS MAY BE BROUGHT UNDER THE ADEA

Petitioner asks this Court to decide whether and, if so, under what circumstances, a disparate impact claim may be brought under the ADEA. Respondent submits that Petitioner's case is not the appropriate vehicle for deciding this question. Though Petitioner asks the Court to recognize disparate impact claims under the ADEA, he even failed to properly plead a disparate impact claim in his Complaint. Furthermore, because the affirmance of Respondent's Motion to Dismiss was based upon the Eleventh Circuit's conclusion that it was bound by its previous panel's ruling in *Adams* — without any analysis of the pleadings — the Court would be forced to decide this issue in an abstract and unhelpful context without the benefit of any factual development. This Court should decide such a question, if it needs to decide the question at all, only in a case where there can be no debate that the claim is well-pleaded and supported by a factual record that facilitates legal analysis.

First, the question whether a disparate impact claim is cognizable under the ADEA is entirely academic here because the Complaint failed to state a valid disparate impact claim under this Court's established disparate impact jurisprudence. Because disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (quotation omitted), a party asserting a disparate impact claim "*must* begin by identifying the specific

employment practice that is challenged. . . . [T]he plaintiff is in our view responsible for *isolating and identifying the specific employment practices* that are allegedly responsible for any observed statistical disparities." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J.) (plurality op.) (emphasis added); *accord*, *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 656-57 (1989). In other words, as the Court implicitly recognized in *Adams*, the disparate impact model is not an appropriate vehicle from which to launch a wide-ranging attack on the *cumulative or bottom-line effects* of employment practices. *Wards Cove*, 490 U.S. at 656-57. *See also Munoz v. Orr*, 200 F.3d 291, 297 (5th Cir. 2000); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277 (5th Cir. 1994); and *Appleton v. Deloitte & Touche L.L.P.*, 168 F.R.D. 221 (M.D. Tenn. 1996).

In *Wards Cove*, a class of nonwhite cannery workers who were or had been employed at the canneries in question brought a disparate impact claim against the canneries alleging that the challenged racial stratification of the workforce was caused by *several* aspects of the canneries' selection process, including the use of subjective decision-making and the use of objective practices such as a rehire preference, separate hiring channels and nepotism. *Wards Cove*, 490 U.S. at 656-57. The Court of Appeals held that the plaintiffs had properly asserted a disparate impact claim. *Id.* On certiorari, the employers claimed that the Court of Appeals erred by allowing the plaintiffs to proceed with their disparate impact claim based solely on "[one] set of cumulative comparative statistics as evidence of the disparate impact of *each and all* of [petitioners' hiring] practices." *Id.* at 656 (emphasis added). In reversing the Court of Appeal's decision, this Court agreed, emphasizing that a plaintiff "does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is racial *imbalance*

in the work force." *Id.*, *citing Connecticut v. Teal*, 457 U.S. 440, 450 (1992) (emphasis in original). The Court emphasized that:

> Respondents will . . . have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, *specifically showing that* ***each*** *challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites.* To hold otherwise would result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances. . . .'

Id. at 657, *citing Watson*, 487 U.S. at 992 (emphasis added). In other words, the Court in *Wards Cove* held that plaintiffs alleging disparate impact discrimination must isolate and identify a *particular* employment practice that has a disparate impact on the protected group. Simply claiming that an employer's *entire* selection process *as a whole* has a disparate impact is insufficient. *Id.* After the Court's decision in *Wards Cove*, courts have continued to emphasize that a plaintiff cannot successfully assert a disparate impact claim merely by claiming that the cumulative or bottom-line impact of the employer's selection process results in an adverse impact on members of a protected class. Rather, a plaintiff must still identify a *particular* part of the selection process that causes the challenged adverse impact. *See* the following and cases cited therein: BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW vol. 1, 100-02 (Paul W. Cane, Jr. ed., 3d ed. 1996); BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW vol. 2, 1701-02 (Paul W. Cane, Jr. ed., 3d ed. 1996); BARBARA LINDEMANN

& PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 78-80, 1167-68 (C. Geoffrey Weirich ed., 3d ed. Supp. 2002).[2]

2. In the Civil Rights Act of 1991, Congress codified in part and departed in part from the Court's decision in *Wards Cove*. Under the 1991 Act, a plaintiff can sufficiently plead a disparate impact claim based solely upon a bottom-line disparity resulting from the challenged selection process where the plaintiff "demonstrate[s] to the court that the elements of a respondent's decision-making process are not capable of separation for analysis." 42 U.S.C. § 2000e-2(k)(1)(A)(i), (B)(i). Thus, if the challenged decision-making process includes multiple, but functionally integrated practices, the plaintiff bears the burden of demonstrating that the elements of the employer's decision-making process are not capable of separation for analysis and must be analyzed as one employment practice. *Id. Malave v. Potter*, 320 F.3d 321 (2d Cir. 2003), *citing Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002). *See also Smith v. Xerox*, 196 F.3d 358 (2d Cir. 1999); *Gonzales v. City of New Braunfels*, 176 F.3d 834 (5th Cir. 1999); KINGSLEY R. BROWNE, THE CIVIL RIGHTS ACT OF 1991: A "QUOTA BILL," A CODIFICATION OF GRIGGS, A PARTIAL RETURN TO WARDS COVE, OR ALL OF THE ABOVE?, 43 CASE W. RES. 287, 329-30 (1993)

> . . . the elements must not be *capable* of separation for analysis. The plaintiff has the burden of proving that he is entitled to rely on that exception and cannot satisfy that burden merely by showing that he has been unable to identify those elements or that it would be very difficult or expensive to do so.

Because the ADEA was not amended in the wake of *Wards Cove*, *supra*, the 1991 Act is irrelevant to Petitioner's claims and his reliance on the "bottom line" would render the Complaint subject to dismissal even if a disparate impact theory were available under the ADEA. In any event, courts have determined that the 1991 Act did not alter the "particularity" aspect of *Wards Cove*. *See, e.g., Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1372 (5th Cir. 1992); *Stout*, 276 F.3d at 1124 (court "doubt[ed] that the overall screening process should be treated as one employment practice for purposes of disparate impact analysis."); *Munoz*, 200 F.3d at 304 (questioning, without deciding, whether the plaintiffs had properly alleged that the employer's "Merit Promotion Plan" or "MPP" was either one employment practice or could be separated for analysis).

This is certainly not a case where the petitioner challenges a discrete, straightforward, neutral rule such as a high school diploma, a height requirement or a weight requirement. To the contrary, in the present case, Petitioner attempts to challenge the alleged cumulative effects of Respondent's complex, multi-layered performance evaluation and ranking process in direct contravention of this Court's holding in *Wards Cove*. *Wards Cove*, 490 U.S. at 656-57. Petitioner has failed to isolate and identify which of the numerous practices that comprise the PMP he claims is responsible for the alleged disparate impact. For example:

1) Is it the actual performance assessment process in which each employee was subjectively reviewed on a local basis by their respective different supervisors? (Pet. at App. 27; Complaint ¶35(A)).

2) Is it the practice by which the numerical values assigned to criteria leading to the score of each employee were subjectively assigned by different supervisors based on that supervisor's impression of the importance of the criteria to the job? (Pet. at App. 27; Complaint ¶35(A)).

3) Is it the actual ranking process that was performed by the "corporate ranks" once the local managers reviewed and scored the individuals on their teams? (Pet. at App. 28; Complaint ¶35(C)).

4) Is it the practice by which the rankings were performed across job codes nationally and not within a specific geographic region? (Pet. at App. 29; Complaint ¶37(B)).

5) Is it the practice by which the PMP required employees to be placed into categories to meet predetermined statistical needs of the ranking model, not Respondent's needs? (Pet. at App. 29; Complaint ¶37(A)). ***or***,

6) Is it that "[o]rganizationally" there were delays in the dissemination of information and there was "considerable confusion" in the establishment of performance objectives? (Pet. at App. 28; Complaint ¶35(D)).

While Petitioner has attempted to dress up his Complaint to meet the misgivings expressed by the Court during oral argument in *Adams*, in the end, Petitioner has done nothing more than attack the *cumulative or bottom-line* results of Respondent's overall performance evaluation and ranking processes. *See Wards Cove*, 490 U.S. at 656-57. Although this Court has recently held that a plaintiff alleging employment discrimination need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief," that decision does not relieve the plaintiff of the obligation to identify in his pleadings a specific employment practice that is the cause of the disparate impact. *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002).

Where, as here, members of the protected class were evaluated and ranked at different times, by different decision-makers, based on different considerations or criteria, as part of a multi-layered selection process, Petitioner's allegation that the "Process" as a whole caused a disparate impact on older workers is legally insufficient. (*See, e.g.*, Pet. at App. 28-29, 30-31; Complaint ¶¶36, 37, 41, 43 and 44). *See also Smith*, 196 F.3d at 367; *Anderson*, 26 F.3d at 1284. To recognize a disparate impact claim in this setting would result in Respondent being potentially liable for "the myriad of innocent causes" that may have led to the alleged disparity in the group of employees selected for its reduction in force. *Wards Cove*, 490 U.S. at 657.

Second, this case does not present the question whether and, if so, under what circumstances, disparate impact claims

may be brought under the ADEA in a helpful context for a decision by the Court. Because Petitioner's disparate impact allegations are conclusory, and because none of the averments supporting the disparate impact claim were even analyzed by the court below, the record underlying these allegations is undeveloped and would require a pronouncement in the abstract that would border on the advisory. Any effort to resolve such a question in this petition would be seriously hampered by both the lack of a concrete, well-pleaded disparate impact claim and the lack of a clear and cogent set of facts serving as a base for the Court's legal analysis. It bears repeating that the Eleventh Circuit did not review the pleadings or substantively discuss the question of whether the ADEA recognizes disparate impact claims. Rather, the Eleventh Circuit, in its unpublished holding, merely concluded that it was bound by the *Adams* panel's prior ruling on the issue. As a consequence, it would be more prudent to address the question presented in the context of a record that is adequately developed and that sharpens the issue. Certainly, without such a record, the Court simply cannot sensibly determine, as Petitioner requests, the circumstances, if any, in which a disparate impact claim would be appropriate under the ADEA. *See, e.g., Secretary of State of Maryland v. Munson*, 467 U.S. 947, 977 (1984) (Rehnquist, J. dissenting) (noting that decisions based upon well developed factual records are likely to be "more sound" because "the facts of the case focus and give meaning to the otherwise abstract and amorphous issues the court must decide").

In summary, this case is an inappropriate vehicle for considering whether, and, if so, under what circumstances, disparate impact claims are cognizable under the ADEA. The question before the Court arises in a Complaint without sufficient allegations to present the question and without a developed factual record concerning the claims in this case.

Respondent respectfully contends that the debate regarding these tangential, but significant issues, would overshadow and undermine the Court's resolution of the central issue on which Petitioner seeks a writ of certiorari.

II. THE PURPORTED SPLIT AMONG THE COURTS OF APPEAL IS NEITHER AS PROFOUND NOR AS SEVERE AS PETITIONER SUGGESTS

Respondent respectfully submits that the issue presented to the Court by Petitioner is ripe for further debate and perhaps resolution by the Courts of Appeal, rather than by this Court. Although Petitioner suggests that "[i]t is hard to conceive of a case presenting a clearer conflict in the circuits," Pet. at 12, the circuit split is neither as profound nor as severe as Petitioner represents. The decision below is supported by every reasoned appellate court decision on the subject; and since this Court's 1993 decision in *Hazen Paper*, a number of Courts of Appeal have reversed their prior positions and held that disparate impact claims are not cognizable under the ADEA. Therefore, Respondent submits that the current judicial conflict over whether the ADEA recognizes disparate impact claims will resolve itself through further consideration by the lower courts. Even if that resolution does not occur, further analysis by the lower courts will assist the Court in sharpening the issue for this Court's ultimate consideration.

Since this Court's decision in *Hazen Paper*, "there is a clear trend toward concluding that the ADEA does not support a disparate impact claim." *Ellis*, 73 F.3d at 1009. Prior to *Hazen Paper*, some lower courts had carried over disparate impact law from Title VII to the ADEA, but they did so with little analysis. *See, e.g., Geller v. Markam*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). After *Hazen Paper* cast doubt upon those decisions, a number of

courts of appeals revisited the issue and determined that disparate impact claims are not recognized under the ADEA.

For example, both the Seventh and Tenth Circuits reversed prior decisions and held that disparate impact claims are not cognizable under the ADEA. *See EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995); *Ellis*, 73 F.3d at 1006-10. The First Circuit concurred, and opinions from other circuits have expressed support for this position. *Mullin*, 164 F.3d at 699-704; *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1004 (5th Cir. 1996) (en banc) ("*Hazen Paper* indicates that disparate impact theory is not available under the ADEA."); *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995) (expressing "considerable doubt as to whether a claim of age discrimination may exist under a disparate theory" in an ADEA case); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995) (same). Of course, most recently, the Eleventh Circuit, after close analysis of the text of the statute, its purposes and legislative history, as well as practical considerations, held that the ADEA does not recognize disparate impact claims. *Adams*, *supra*.

After *Hazen Paper*, three circuits — the Second, the Eighth and the Ninth — have continued to recognize disparate impact claims under the ADEA. Notably, however, none of these circuits has actually analyzed anew whether such claims are properly recognized. Instead, noting that *Hazen Paper* did not formally resolve the issue, these courts have chosen to follow their pre-*Hazen Paper* precedent without any discussion of the substance of that precedent. *See, e.g.*, *District Council 37, AFSCME v. New York City Dep't of Parks and Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994); *EEOC v.*

Local 350 Plumbers and Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1993). Moreover, because the cases recognizing disparate impact claims in the Second and Eighth Circuits were decided against the plaintiffs, the recognition of disparate impact in those circuits was actually dicta; only the Ninth Circuit has affirmed a disparate impact claim on appeal since *Hazen Paper*. *See Frank v. United Airlines*, 216 F.3d 845, 856 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001); *Arnett v. California Pub. Employees Retirement Sys.*, 179 F.3d 690, 696-97 (9th Cir. 1999), *vacated and remanded*, 528 U.S. 111 (2000). The Court should also note that opinions from each of these circuits have expressed discomfort in continuing to recognize disparate impact under the ADEA. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291 n.6, 1292 n.7 (9th Cir. 2000) (noting that the circuit has "continued to *assume* that this [disparate impact] theory is still viable after *Hazen Paper*") (emphasis added), *cert. denied*, 533 U.S. 950 (2001); *Smith*, 196 F.3d at 366 n.5 (noting that the circuit has analyzed disparate impact claims under the ADEA "without discussion"); *Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1470 (8th Cir. 1997) (noting that the panel was bound by prior precedent "even if we believed that *Hazen Paper* cast doubt on the validity" of that precedent). Consequently, if these courts reconsider whether disparate impact claims are cognizable under the ADEA, they may, like the Seventh and Tenth Circuits before them, reverse their prior positions and find that such claims are not cognizable under the ADEA.

Respondent respectfully submits that further lower court consideration of the status of disparate impact claims under the ADEA may better illuminate the question whether the ADEA properly recognizes such claims. The opinions concluding that the ADEA recognizes disparate impact claims have so far failed to offer any justification for doing so beyond

the similarities in some of the language of Title VII and the ADEA. The thorough reasoning of the opinions rejecting such claims may cause any future opinions adopting the contrary position to conduct a more searching analysis, which in turn may sharpen the issue and facilitate the Court's resolution of it.

III. THE DECISION BELOW CORRECTLY FOLLOWED THE *ADAMS* HOLDING AND DOES NOT REQUIRE REVIEW BY THIS COURT

The court below did nothing more than abide by the Eleventh Circuit's previous decision in *Adams*. It performed no independent analysis of the viability of disparate impact claims under the ADEA, nor did it even have the need to review the pleadings to assess whether a disparate impact claim had actually been pled. However, to the extent that the court below agreed with the *Adams* panel that the ADEA does not recognize disparate impact claims, it is noteworthy that there was no error committed by the court and thus there is no reason to review that court's decision. As various courts, commentators and Justices of this Court have recognized, the ADEA does not authorize disparate impact claims. In addition to the failure to sufficiently plead a disparate impact claim and the lack of a developed record that make this case a poor vehicle for considering this issue, the arguments in favor of recognizing disparate impact claims under the ADEA set forth in the petition are wholly unpersuasive.

A. The Background of the ADEA Demonstrates That the Disparate Impact Theory is Not Viable Under the ADEA

The ADEA was enacted based on Congressional concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes. *Adams*, 255 F.3d at 1325-26; *see also Hazen Paper*, 507 U.S. at 610, 113 S. Ct. at 1706. Thus, the ADEA was enacted to prohibit decision-making based on arbitrary, inaccurate perceptions of the abilities of older workers. It is evident that when an employer relies on factors other than age in making employment decisions, such arbitrary and inaccurate stereotyping disappears.[3]

1. *Congress Recognized that Age Differs from the Traits Protected Under Title VII.*

During the congressional debates on the Civil Rights Act of 1964, an amendment was proposed to add "age" to Title VII's laundry list of protected traits, thereby protecting age on a basis identical to race, color, sex, religion, and national origin. However, that amendment was rejected. 100 Cong. Rec. 2596-99, 9911-9913, 13490-13492 (1964); EEOC, Legislative History of the Age Discrimination in Employment

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3. By contrast, Title VII was enacted in an

> effort to equalize employment opportunities for individuals whose employment prospects had been dimmed by past discriminatory practices . . . [so] neutral, non-essential employment policies that discriminatorily impact[ed] protected groups would . . . exacerbate the preexisting imbalance and countervail the core purposes of Title VII. Hence, the [Supreme] Court [in *Griggs*] had ample reason to construe the language of Title VII to bar such practices.

Mullin, 164 F.3d at 701.

Act 5-14 (1981). Thus, Congress, at the outset of its regulation of workplace discrimination, recognized that age differed from race, color, sex, religion, and national origin.

Title VII did include a provision directing the Secretary of Labor to "make a full and complete study of the factors which tend to result in discrimination because of age" and report to Congress. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964). Congress further instructed the Secretary to report "such recommendations for legislation to prevent arbitrary discrimination in employment because of age." *Id.*

2. *The Secretary of Labor's Report Was Only Concerned With Intentional Discrimination.*

The ADEA was enacted upon recommendations from the Secretary of Labor in the report, "The Older American Worker: Age Discrimination in Employment" (1965) ("Secretary of Labor's Report") (as discussed in *Ellis*, 73 F.3d at 1008; *Mullin*, 164 F.3d at 703; *Adams*, 255 F.3d at 1325-26) (App. B, *infra*, 8a-15a). Petitioner ignores the importance of this Report. However, the Secretary of Labor's Report is the blueprint for the ADEA, and its importance cannot be disregarded. The Secretary of Labor's Report is in essence the legislative history of the ADEA.

The Secretary of Labor testified that the proposed bill which became the ADEA was directed at arbitrary discrimination which is made in the absence of any legitimate relevance between age and employment capacity. *See* Hearings on S. 830 Before the Subcomm. on Labor of the Senate Subcomm. on Labor and Public Welfare, 90th Cong. 37 (1967). Arbitrary means "depending on choice or discretion," clearly signifying intentional conduct. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, pg. 110 (1976).

The Secretary of Labor's Report distinguished between problems of intentional, arbitrary discrimination based on age stereotypes and problems resulting from factors that affect older workers more strongly as a group. App. B, Secretary of Labor's Report at 8a-11a. The predominant form of discrimination facing older workers was arbitrary discrimination. *Id.* Still, the Secretary recognized that, "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring." *Id.* at 15a.

Despite acknowledging the existence of practices the effects of which disproportionately disadvantage older workers, the Secretary *did not* recommend that the proposed legislation prohibit such practices. Rather, the Secretary suggested that "special arrangements" be made through education, research, and the institution of programmatic measures designed to improve opportunities for older workers. *Id.* at 11a-15a. The Report noted the need for legislation to prohibit intentional discrimination and ban arbitrary discrimination based on age and stereotypical perceptions of the elderly. App. B, Secretary of Labor's Report at 8a-15a; *Mullin*, 164 F.3d at 703; *Adams*, 255 F.3d at 1325-26. But the Secretary found that barring neutral practices that may have an adverse impact on older workers is "futile as public policy, and even contrary to the public interest." App. B, Secretary of Labor's Report at 11a.

In 1967, based on the Secretary of Labor's Report, Congress enacted the ADEA, P.L. 90-202, "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways

of meeting problems arising from the impact of age on employment." ADEA § 2, 29 U.S.C. § 621(b). The ADEA included prohibitions of age discrimination to address intentional discrimination (ADEA § 4, 29 U.S.C. § 623) and required the Secretary of Labor to conduct education and research programs to help meet the problems arising from the impact of age on employment. ADEA § 3, 29 U.S.C. § 622. Thus, the Secretary of Labor's 1965 Report on age discrimination provides powerful support for the Eleventh Circuit's conclusion that the ADEA does not recognize disparate impact claims.

B. The ADEA Does Not Expressly Authorize Claims Based on Disparate Impact

Petitioner errs in contending that the "plain language" of the ADEA supports disparate impact claims because § 4(a)(2) of the Act "imposes liability for employment practices that 'adversely' affect an employee's 'status.'" Pet. at 14-16; 29 U.S.C. § 623(a)(2). Section 4(a)(2) of the ADEA makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a). Nowhere in this language are disparate impact claims contemplated or acknowledged. As several authorities have recognized, including those cited by Petitioner, a textual analysis that recognizes disparate impact is a "grammatically incorrect reading." *DiBiase*, 48 F.3d at 733 (opinion of Greenberg, J.); *see also* Pamela S. Krop, Age Discrimination and the Disparate Impact Doctrine, 34 Stan. L. Rev. 837, 842-43, & n.27 (1982)).

The Court in *Hazen Paper* stressed that the prohibitions of disparate treatment due to age are embodied in the phrase

"because of such individual's age." *Hazen Paper*, 507 U.S. at 609, *quoting* 29 U.S.C. § 623(a)(1) (disparate treatment theory is triggered when an employer "fail[s] or refuse[s] to hire or . . . discharge[s] any individual or otherwise discriminate[s] against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*.") (Emphasis in original). That is also the operative language of § 4(a)(2). "It would be a stretch to read the phrase 'because of such individual's age' to prohibit incidental and unintentional discrimination." *Ellis*, 73 F.3d at 1007. As both §§ 4(a)(1) and (2) end with the phrase "because of such individual's age," if § 4(a)(1) proscribes only disparate treatment based on this language, then § 4(a)(2) must be similarly limited.

The *Ellis* court stated that since § 4(a)(2) expressly concludes with the same phrase, a parallel reading of the two statutes would require the court to conclude that both are limited to intentional discrimination. *Ellis*, 73 F.3d at 1007. Numerous appellate courts have concurred with the reasoning in *Ellis*. Since this Court identified and emphasized the "because of such individual's age" language is indicative of disparate treatment, that logic should apply to § 4(a)(2) as well. The exclusion of the word "discriminate" and the inclusion of the words "adversely affect" does not compel a different conclusion:

> [T]he 'because of such individuals age' clause can only modify the description of prohibited actions. . . . The parallel working of section [623](a)(2) indicates that it too was aimed at disparate treatment. An employer may not limit, segregate, or classify employees on the basis of age in a manner that would adversely affect an employee.

DiBiase, 48 F.3d at 733-34 (*quoting* Krop, 34 STAN. L. REV. at 843).

Moreover, reading "because of such individual's age" to modify "adversely affect" rather than to modify "limit, segregate, or classify" is grammatically incorrect because of the placement of commas. *DiBiase*, 48 F.3d at 733 (*citing* Krop, 34 Stan. L. Rev. at 842-43). The comma between the "adversely affect" and the "because of" language in Section 4(a)(2), makes any junction between the two grammatically incorrect. *Cf. United States v. Ron Pair Enterp.*, 489 U.S. 235, 241 (1989) (holding that commas prevent junction of language in 11 U.S.C. § 506(b)). The phrase "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," is not naturally read as establishing a standard of liability, but most naturally must be understood to indicate that unlawful intent is necessary to establish liability for employment practices that adversely affect older employees. *DiBiase*, 48 F.3d at 733.

C. The Reasonable Factors Other Than Age Provision Precludes Disparate Impact Claims

Petitioner similarly errs in contending that the "reasonable factors other than age" provision in § 4(f)(1) must be construed as an affirmative defense against disparate impact claims. *See* 29 U.S.C. § 623(f)(1). Courts that have analyzed the reasonable factors other than age provision in § 4(f) have almost universally held that the reasonable factors other than age provision *precludes* disparate impact claims. *See Adams*, 255 F.3d at 1325; *Ellis*, 73 F.3d at 1007-08; *Francis W. Parker School*, 41 F.3d at 1077; *DiBiase*, 48 F.3d at 734; *Mullin*, 164 F.3d at 702. Notably, this provision is absent from Title VII.

Section 4(f)(1), which allows the use of reasonable factors other than age in making employment decisions, is inconsistent with a disparate impact theory of liability,

because "it suggests that decisions which are made for reasons independent of age but which happen to correlate with age are lawful." *Francis W. Parker School*, 41 F.3d at 1077. A consistent reading of this language demonstrates that the exception is meaningless unless the prohibitions of the ADEA forbid disparate treatment and the exception in § 4(f)(1) permits neutral practices that have the effect of differentiating due to age. *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J. dissenting). *See also*, *DiBiase*, 48 F.3d at 734 ("[B]y the statutory language itself, Congress recognized that neutral policies not motivated by discriminatory intent may be permissible employment practices. . . . [A]pplication of disparate impact theory could lead to results which Congress probably did not intend.")

Section 4(f)(1) is inconsistent with disparate impact claims because it permits employers to utilize factors other than age as grounds for employment-based decisions that differentially impact older employees. *Adams*, 255 F.3d at 1325. If the "reasonable factor other than age" provision does not preclude disparate impact liability, it would be meaningless:

> If the exception contained in section 623(f)(1) is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that 'only age discrimination is age discrimination.' Such a circular construction would fly in the teeth of the well-settled canon [of statutory construction] that 'all words and provisions of a statute are intended to have meaning and are to be given effect, and no constructions should be adopted which would

render statutory words or phrases meaningless, redundant, or superfluous.'

Mullin, 164 F.3d at 702. Because "application of [the] disparate impact theory could lead to results which Congress probably did not intend," *DiBiase*, 48 F.3d at 734, Section 4(f) of the ADEA, a provision absent from Title VII, precludes disparate impact claims.

In the Secretary of Labor's Report, the Secretary recognized the necessity of acknowledging forces of circumstance that "unquestionably affect older workers more strongly, as a group." App. B, Secretary of Labor's Report at 11a. The Secretary identified a number of factors, such as health, educational attainment and technological change. Thus, the Secretary of Labor's Report recognized that when health is a factor for obtaining a job, older workers may, quite justifiably, be rejected in greater proportion than younger workers. However, older workers should not be excluded from consideration based on their age rather than their health. Section 4(f) adopts this very distinction. Consistent with the Secretary of Labor's findings, older workers should not be denied employment based on assumptions concerning their health. Rather, if good health is a factor considered for employment, the employer may use that factor regardless of its greater impact on older workers.

In his report, the Secretary of Labor drew a sharp distinction between "arbitrariness of specific age limitations, indiscriminately applied" and "the force of certain circumstances which unquestionably affect older workers more strongly, as a group, than they do younger workers." App. B, Secretary of Labor's Report at 11a. Ultimately, the Secretary of Labor recommended statutory prohibitions against arbitrary discrimination based on age, but to address

other impediments to employment of older workers, he recommended adjustment of "institutional arrangements," an increase in "the availability of work for older workers," and enlargement of "educational concepts in institutions" to meet the needs and opportunities of older age. *Id.* at 12a-13a. Plainly, when Congress enacted the ADEA, it heeded the Secretary of Labor's recommendation and prohibited only intentional discrimination based on age, while recognizing that other reasonable factors such as health, education and technology change may, unavoidably, lead to lawful differences in the employment of younger and older workers. Section 4(f) embodies this recognition.

D. The Supreme Court Relied on the Intent of Title VII, Rather Than a Specific Section of Title VII, in Creating the Disparate Impact Theory in *Griggs*

Petitioner also erroneously suggests that this Court's decision in *Griggs et al. v. Duke Power Co.*, 401 U.S. 424 (1971), was premised on an analysis of the specific language in Title VII, rather than on this Court's analysis of Title VII's intent. Though lower courts later stated that § 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2), was the basis for the holding in *Griggs*, *see, e.g.*, *Francis W. Parker School*, 41 F.3d at 1077, a careful reading of *Griggs* demonstrates that this Court based its opinion on its perception that Title VII was intended to address the long history of societal and historical bias against blacks.

Griggs involved a claim by a black plaintiff against an employer with a history of blatantly exclusionary practices. *Griggs*, 401 U.S. at 426-27. Following the passage of the Civil Rights Act in 1964, the employer replaced those practices with two facially neutral job requirements: a high school diploma and a satisfactory score on a standardized

aptitude test. *Id.* at 427-28. Despite facial neutrality and neutrality in application, the two requirements disqualified a disproportionate percentage of black applicants from consideration for desirable positions; almost three times as many whites as blacks could meet the high school diploma requirement, and almost ten times as many whites as blacks passed the standardized aptitude test requirement. *Id.* at 430 n.6. The lower courts concluded that there was no showing of a racial purpose or invidious intent in the adoption of the two requirements, and held the employer's use of the requirements was lawful under Title VII. *Id.* at 428-29. This Court reversed. However, while the *Griggs* opinion judicially created the theory of disparate impact, it did so based on an analysis of the intent, as opposed to the text, of the statute.

In *Griggs*, the court focused on the historical background of racial discrimination. As justification for the disparate impact theory, the Court relied upon the general purpose and principles of Title VII. *Id.* at 429-32. The only reference to a specific section of Title VII was in footnote one, where the Court quoted §§ 703(a)(2) and (h). Without any textual reference, the Court found that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation." *Griggs*, 401 U.S. at 432. Thus, the Court believed the intent of Title VII was focused on the consequences of employer actions, regardless of intent:

> The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be

> maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

Griggs, 401 U.S. at 429-30; *Connecticut v. Teal*, 457 U.S. at 448. *See also Ellis*, 73 F.3d at 1003 n.13 ("*Griggs* did not base its holding on the text of Title VII, but rather looked primarily to the larger objectives underlying Congress' enactment of Title VII")[4]; *DiBiase*, 48 F.3d at 734 (same). The Court was obviously influenced by the employer's history of overt racial discrimination, which ceased after the enactment of Title VII, but was replaced by the diploma and testing requirements at issue. *Griggs*, 401 U.S. at 428-29. It is the overt prejudice noted in *Griggs* that separates racial discrimination from age discrimination. A remotely similar history of invidious age discrimination does not exist. In fact, the Secretary of Labor's Report stated that it would be "wrong" to apply the prohibitions of Title VII to discrimination based on age because Title VII discrimination "often has its origins in prejudices that originate outside the sphere of employment. *There are no such prejudices in American life which apply to older persons.*" App. B, Secretary of Labor's Report at 9a-10a (emphasis added).

As the Third Circuit Court found in *DiBiase*, *supra*, the policy of Title VII is not easily transplanted into the ADEA because the purpose of the ADEA was to prohibit employers from acting upon an assumption that "productivity and competence decline with old age." *DiBiase*, 48 F.3d at 734. Thus, as disparate impact theory is premised upon the deplorable history of racial discrimination and the larger objectives underlying Title VII, *Ellis*, 73 F.3d at 1007 n.13, it does not apply to age-based conduct. Therefore, the analysis employed in *Griggs* does not transfer to the ADEA context.

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4. *Ellis* continued, "the ADEA differs from Title VII in these nontextual considerations, as well as its text and structure." *Ellis*, 73 F.3d at 1007 n.13.

CONCLUSION

Despite Petitioner's attempt to plead around the concerns raised by the Court at oral argument in *Adams*, Petitioner, like the petitioner in *Adams*, merely challenges the cumulative effect of Respondent's nationwide performance and ranking decision-making process. Such a broad attack is improper to support a disparate impact claim. Further, as the court below merely abided by the *Adams* panel's holding, it had no reason to thoroughly examine the deficiencies in Petitioner's Complaint. Accordingly, this case is simply not a conducive vehicle for the Court to answer the question presented. For this dispositive reason, and the additional compelling considerations addressed above, Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM ORAL ARGUMENT OF *ADAMS v. FLORIDA POWER*, 2002 WL 483467 DATED MARCH 20, 2002

SUPREME COURT OF THE UNITED STATES

No. 01-584

Wednesday, March 20, 2002

Oral Argument

Wanda ADAMS, et al.,

Petitioners,

v.

FLORIDA POWER CORPORATION
and FLORIDA PROGRESS CORPORATION,

Respondents.

Washington, D.C.

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JOHN J. CRABTREE, ESQ., Key Biscayne, Florida; on behalf of the Petitioners.

GLEN D. NAGER, ESQ., Washington, D.C.; on behalf of the Respondents.

Appendix A

* * *

ORAL ARGUMENT OF JOHN G. CRABTREE
ON BEHALF OF THE PETITIONERS

* * *

QUESTION: May I ask, because it's always helpful to me to know, what's at stake in the particular case. What is the practice that you claim has a disparate impact in this case?

MR. CRABTREE: We have alleged in this case that the employer's reduction in force has had a disparate impact upon the older workers, the selection device of the older workers.

QUESTION: Are you saying reductions in force are always practices that if they have a disparate impact, give rise to a, an age discrimination claim?

MR. CRABTREE: No, Your Honor, because in virtually every instance where there is reduction in force it will be quite easy for the employer to satisfy the defense under the reasonable factors of the age provision of the act.

QUESTION: What is different about the reduction in force in this case?

MR. CRABTREE: Well, in this case, Your Honor, as the district court acknowledged in its opinion that we are proceeding from, we had evidence that the highest levels that the decision to undertake the downsizing was actually a decision to get rid of, intended to get rid of older workers.

QUESTION: That's the disparate treatment claim?

MR. CRABTREE: Unfortunately, it's not, Your Honor, because as the district court judge acknowledged, we could not make a disparate treatment case under these facts because in the disparate treatment case, we would still have to prove, unless we could make a cat's paw analysis that the actual decision maker harbored an animus against the employee that's terminated. But we are suggesting under this model and under this framework is that if we can make a prima facie I can't case of disparate impact, then the employer can justify that impact by showing that its decision was based upon reasonable factors and that those reasonable factors—

QUESTION: But this is what I—excuse me for interrupting, but is it the decision to downsize that it has to be reasonable or the particular discharge decisions on each individual have to be reasonable?

MR. CRABTREE: We have identified in this case the action of the employer as being the decision to downsize itself.

QUESTION: The decision to downsize itself?

MR. CRABTREE: Which for most instances will be much more difficult probably for plaintiffs than it would be if you want on a more micro-level. However—

QUESTION: Why would it be more difficult? All I have to prove if I understand your theory is that there are more older workers in the group that were discharged than younger workers?

MR. CRABTREE: Will, it would have to be a substantially disparate impact between the two groups. It would be more difficult because it would be much easier for an employer to justify a reduction in force in almost any circumstance.

QUESTION: I thought you conceded that it was not enough for you to show disparate impact. That you had, say 70 percent of the people and my problem with your presentation is the same as Justice Stevens. In every disparate impact case that I know, a rule neutral is on its face that disparate impact like the high school diploma requirement in Griggs, there is the standard that has a differential effect. A high school diploma, a pen and paper test as in Washington v. Davis, a height, weight requirement as in Dothard vs. Rawlinson, but you don't come to us with any rule, standard, practice. You just say reduction in force.

MR. CRABTREE: Well, what we are saying is this, is that the Court indicated in Wards Cove that the plaintiff in an age—in a discrimination case is to identify a specific practice or action by an employer that results in disparate impact that cannot be justified. We have identified this downsizing as being such a practice because we don't believe the employer can justify because the downsizing was motivated by desire to—

QUESTION: Why don't we leave motive out of it for purposes—forget motive. Let's imagine in your case, that's what I thought this case was about, we imagine in your case the employer had a wonderful motive. There are other cases where the rule in question was we are going to fire some

tenured teachers to save money. That was the real reason to save money. The tenured teachers tend to be older teachers. There was another case in which they said the court looked at a rule that said we will fire people in the higher-paid positions. That was their real reason to save money.

But the court said each of those rules like your case, too, has a disparate impact on older employees. And just saving money is not a justification and therefore the plaintiff wins. Now, I take it that's the proposition you are defending.

MR. CRABTREE: We are defending that proposition. That's correct.

* * *

QUESTION: But as—may I go back to the question that we opened with, and that is I don't know of any case under Title VII where someone could just say reduction in force affected more women than men, therefore, I have an impact case or reduction in force, it affected more minorities than majorities so therefore. It's always been some specific practice that you could identify some rule, some neutral rule. In fact, it's even sometimes referred to as neutralized base discriminatory and impact.

Here I don't—reduction of force in and of itself is not such a neutral rule. It's—it's too general. So I, what is the precise rule practice standard that's comparable to a high school diploma, a height and weight. What is there in this case?

MR. CRABTREE: Your Honor, two answers. First of all, that we equate reduction in force to a test. It's a selection process. We are not challenging a question on the test. We are challenging the test itself. But even if the court were to find that we have inadequately identified the action of the employer that should be subject to disparate impact analysis, we would still, it's an interlocutory proceeding. We would be happy to proceed on the theory as the court redefines or the court defines disparate impact under the ADEA. We would amend our complaint in accordance with the court's ruling.

QUESTION: I don't think that the district court finding allows you to say the standard, the standard is the reduction itself because the district judge said that the people involved held a wide variety of jobs, were managed and supervised by different people and were terminated at different times by different decision makers based on different considerations of criteria, and that seems to me just wholly to reject that there is a rule or a standard.

MR. CRABTREE: The reason why we believe it's important to be able to do the analysis with the reduction of force being the action is because otherwise it would allow an employer to purposely choose to do a reduction in force to get rid of its older workers where there is a corporate culture pervaded by ageism and have consequences as it did here where it greatly reduced the age of its work force.

QUESTION: What is your closest precedent under Title VII dealing with race or dealing with sex where you have something so groundly general as a reduction in force with different decisions, different standards, different times?

MR. CRABTREE: There are cases dealing with reduction of force under Title VII. There is one NAACP vs. Medical Center, Inc., It was out of the third circuit. 657 F.2d 1322. There have probably been others.

QUESTION: And nothing more specific than a reduction in force?

MR. CRABTREE: Candidly, Justice Ginsburg, I don't recall.

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APPENDIX B — EXCERPTS FROM JUNE 1965 REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964: THE OLDER AMERICAN WORKER – AGE DISCRIMINATION IN EMPLOYMENT

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Factors Which Might Tend to Result in Discrimination in Employment Because of Age

Older workers are in general valued and often prized employees. Almost 97 percent of male workers 45 and over were employed in 1964. Persons over 45 make up almost 40 percent of the U.S. labor force, but only 27 percent of total unemployment, and only 17 percent of all the applicants registered at the public employment service offices. Most older workers who are not at retirement age do get reemployed when they lose jobs.

There is, nevertheless, clear evidence of the Nation's waste today of a wealth of human resources that could be contributed by hundreds of thousands of older workers, and of the needless denial to these workers of opportunity for that useful activity which constitutes much of life's meaning.

The central element identifiable in this situation is the fact of sluggish human adjustment and impersonal economic accommodation to the present rapid pace of scientific and technological progress.

These findings analyze the extent to which older workers are deprived of useful and profitable activity as a result of

each of the four types of discrimination described in the Introduction to this report.

As has already been indicated in the Introduction, we find no significant evidence of the first kind of discrimination—that which is based on the kind of dislike or intolerance that sometimes exists in the case of race, color, religion, or national origin, and which is based on considerations entirely unrelated to ability to perform a job.

We do find substantial evidence of arbitrary practice in the second category of discrimination—discrimination based on unsupported general assumptions about the effect of age on ability—in hiring practices that take the form of specific age limits applied to older workers as a group.

We find that in the third category, which involves decisions made about aging and the ability to perform in individual cases, there may or may not be arbitrary discrimination on the basis of age, depending on the individual circumstances.

Individual circumstances may similarly lead to arbitrary discrimination in the fourth category, that involving institutional arrangements which operate indirectly to restrict the employment of older workers.

A. Discrimination Arising from Dislike or Intolerance

Discrimination in employment based on race, religion, color, or national origin is accompanied by and often has its origins in prejudices that originate outside the sphere of

employment. There are no such prejudices in American life which apply to older persons and which would carry over so strongly into the sphere of employment.

The process of aging is inescapable, affecting everyone who lives long enough. It is gradual, minimizing and obscuring differences among people. At all times there are people of all ages living in close association rather than in separate and distinct social or economic environments. The element of intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers.

It is true that hiring officials are not immune to the brightness, vigor, and attraction of youth, nor always above exploiting these attributes for commercial advantage. But such choices involve preferences *for* one group, rather than antagonism *against* another.

We have found no evidence of prejudice based on dislike or intolerance of the older worker. The issue of discrimination revolves around the nature of the work and its rewards, in relation to the ability or presumed ability of people at various ages, rather than around the people as such. This issue thus differs greatly from the primary one involved in discrimination on the basis of race, color, religion, or national origin, which is basically unrelated to ability to perform work.

This is not to say that there is no intolerant prejudice against older persons as such. Determinations not to employ older workers can become deep-seated and even emotional

in character. But were this the sole matter, the degree to which it exists would not warrant public concern.

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C. The Necessary Recognition of Forces of Circumstance

Consideration has been given in the preceding section to the arbitrariness of specific age limitations, indiscriminately applied. It is equally important to recognize the force of certain circumstances which unquestionably affect older workers more strongly, as a group, than they do younger workers.

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III. Conclusions and Recommendations

It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

The firmest conclusion from this year long study is that the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as "arbitrary" and to concentrate on the prohibition of practices which include this element.

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A larger, more informed effort is required.

To the extent that arbitrary discrimination occurs, it can and should be stopped.

To the extent that obstacles exist to the employment of older workers because of limitations in their abilities, these abilities must be enlarged.

To the extent that the process of matching men and jobs is working to the disadvantage of older workers, the process must be improved.

To the extent that employment security and income maintenance programs are having a wholly unintended adverse effect on the position of older workers who are unemployed, these programs must be adjusted.

All these things are possible, given a national will and a national effort.

Such an effort will include four types of programs.

First: *Action* to eliminate arbitrary age discrimination in employment.

Second: *Action* to adjust institutional arrangements which work to the disadvantage of older workers.

Third: *Action* to increase the availability of work for

older workers.

Fourth: *Action* to enlarge educational concepts and institutions to meet the needs and opportunities of older age.

These recommendations are made pursuant to a Congressional directive that a study be carried out and that the Secretary of Labor report the results of such study and "include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." These recommendations derive only from the directive and the study. They do not constitute proposals by the Administration. Their ultimate consideration will necessarily be as part of a broader balancing with other important measures involving other needs.

Action to Eliminate Arbitrary Age Discrimination in Employment

There is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability. The use of these age limits continues despite years of effort to reduce this type of discrimination through studies, information and general education undertaken by the Federal Government and many States, as well as by nonprofit and employer and labor organizations.

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The possibility of new *nonstatutory* means of dealing with such arbitrary discrimination has been explored. That area is barren.

State experience with statutes prohibiting discrimination in employment on the basis of age indicates that such practice can be reduced by a well-administered and well-enforced statute, coupled with an educational program. It is clear from this experience that an educational program to promote hiring on the basis of individual merit is far more effective when provided for by statute.

The elimination of arbitrary age limits on employment will proceed much more rapidly if the Federal Government declares, clearly and unequivocally, and implements so far as is practicable, a national policy with respect to hiring on the basis of ability rather than age.

Such implementation should emphasize the role to be played by persuasion and education, both in general and in individual cases of alleged violations of policy, and should provide for action in the event that persuasion and education fail.

Specific provision should be made for handling instances of *alleged* arbitrary discrimination where the facts of the case indicate that the older worker in question needs reeducation, training, counseling, or health and other services. In these cases, the individual should be referred to the appropriate programs for needed assistance.

While State laws have been increasing in number, some are not implemented at all, and, with few exceptions, the

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State resources have been inadequate for assuring effective compliance. Activities on behalf of older workers have had a tendency to become submerged in broader programs to prevent discrimination on account of race, color, or religion.

A clear-cut and implemented Federal policy against arbitrary discrimination in employment on the basis of age would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age.

Action to Adjust Institutional Arrangements Which Work to the Disadvantage of Older Workers

To eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring.

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